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Federal Communications Commission
Office of the Secretary

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	CG Docket No. 02-278
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	
)	
Starkle Ventures, LLC's Petition for Rulemaking)	CG Docket No. 05-338
to Rescind Established Business Relationship Rule)	
for Facsimile Advertisements)	
)	

To: The Commission

APPLICATION FOR REVIEW

Starkle Ventures, L.L.C., by its attorneys and pursuant to 47 U.S.C.A. § 155(c)(4) and 47 C.F.R. §§ 1.104(b) and 1.115, applies to the Federal Communications Commission for the review of the Order of the Chief of the Consumer and Governmental Affairs Bureau declining to commence a rulemaking proceeding to rescind the established business relationship exception for facsimile advertisements (as it existed from October 16, 1992 to July 9, 2005), which action was released publicly on March 15, 2007; and in support of this application shows the following:

I. Order to be Reviewed

In a March 15, 2007, Order the Chief of the Consumer and Governmental Affairs Bureau publicly denied Starkle Ventures LLC ("Starkle") Petition for Rulemaking, filed September 1, 2005, refusing to commence a rulemaking proceeding to rescind the established business relationship exception for facsimile advertisements for the time prior to Congress' July 9, 2005 amendment to the Telephone Consumer Protection Act (TCPA).

II. Factual Background

In 1991 the Telephone Consumer Protection Act (“TCPA”) ~~was~~ enacted by Congress which, among other things, prohibited the sending of a facsimile advertisement without “prior express invitation or permission” from the person to whom the facsimile advertisement was sent. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (*see* §§ 227(a)(4) and (b)(1)(C)).

In 1992, however, the Commission created ~~an~~ “established business relationship” liability exemption for facsimile advertisements: “We note, however, that facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient.” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 F.C.C.R. 8752,8779 at ¶54 n.87 (1992). The Commission reaffirmed the exemption in a 1995 order, stating “the existence of an established business relationship establishes consent to receive telephone facsimile advertisement transmissions.” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 F.C.C.R. 12391, 12408 at ¶37 (1995).

In 2002, the Commission sought comment on “the Commission’s determination that a prior business relationship. . . establishes the requisite consent to receive telephone facsimile advertisement transmissions.” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 F.C.C.R. 17459,17483 (2002). As a

result of the Commission's Proposed Rule Making in 2002, the Commission rescinded the exemption in 2003, but only from the effective date of the order forward; the Commission reaffirmed the applicability of the exemption to any facsimile advertisements sent prior to such effective date: "We emphasize that, prior to the effectuation of rules contained herein, companies that transmitted facsimile advertisements to customers with whom they had established business relationships were in compliance with the Commission's existing rules." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 F.C.C.R. 14014, 14127 ¶189 and n.699 (2003).

The Commission then effectively negated its prospective rescission of the exemption by repeatedly extending the effective date of that portion of the order until January 9, 2006. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order on Reconsideration, 18 F.C.C.R. 16972 ¶ 1 (2003) (extending effective date to January 1, 2005); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 19 F.C.C.R. 20125 ¶ 1 (2004) (extending effective date to June 30, 2005); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991: Junk Fax Prevention Act of 2005*, CG Docket No. 02-278, Order, FCC 05-132 (2005) (extending effective date to January 9, 2006). In the meantime, on July 9, 2005 the TCPA was amended by Congress to include - for the first time - a statutory "established business relationship" liability exemption for facsimile advertisements. Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359.

Prior to July 9, 2005, numerous individuals and entities sent telephone facsimile advertisements to Petitioner without first obtaining prior express invitation or permission to do so. Petitioner believes these facsimile advertisements violated the pre-amendment TCPA. However, some of these individuals and entities have asserted they are not liable based on the Commission's purported "established business relationship" exemption to fax-advertising liability under the pre-amendment TCPA. Petitioner believes the Commission-recognized "established business relationship" exemption is invalid. On September 1, 2005, Petitioner sought to commence rulemaking procedures, which is the subject of this application, for the rescission of the Commission's "established business relationship" exemption to eliminate it as a potential barrier to recovery for facsimile advertisements sent prior to July 9, 2005.

III. Statement of Interest

Starkle is aggrieved by such action in that prior to Congress' amendment on July 9, 2005, to the TCPA, numerous individuals and entities sent telephone facsimile advertisements to Starkle without obtaining its prior express invitation or permission. Starkle believes these facsimile advertisements constituted a violation of pre-amendment TCPA and believes the Commission's "established business relationship" exemption that it purportedly recognized between October 16, 1992 and July 9, 2005 is invalid. Starkle seeks rescission of the Commission's "established business relationship" exemption to eliminate it as a potential barrier to recovery for facsimile advertisements sent prior to July 9, 2005. Therefore, Starkle is aggrieved by the denial of the commencement of a rulemaking proceeding to determine whether the established business relationship exemption pre-TCPA amendment should be rescinded.

IV. Question Presented for Review

Whether the Federal Communications Commission's "established business relationship" exemption for facsimile advertisements, as it existed between October 16, 1992 and July 9, 2005, ~~was~~ illegal and should be rescinded?

The Chief of the Consumer and Governmental Affairs Bureau had an opportunity to pass on the above questions of fact and law by initiating a rulemaking proceeding, but refused to do so, ruling adversely to Starkle thereon.

V. Grounds for Review

The following factors warrant Commission consideration of the above question:

1. The action complained of involves a question of law not previously resolved by the Commission, specifically whether the Commission's "established business relationship" exemption it recognized prior to the TCPA's amendment on July 9, 2005, is valid.
2. The action complained of involves the application of a Commission precedent of imposing an "established business relationship" exemption which should be overturned because it was not within the Commission's power.

The TCPA grants the Commission the authority to "prescribe regulations to *implement* the requirements" of subsection (b) of the TCPA, which includes the facsimile advertisement prohibition. 47 U.S.C. §§ 227(b)(2) (conferring rule making authority to "implement" subsection (b)(emphasis added)), 227(b)(1)(C) (prohibition on sending "unsolicited advertisement"), and 227(a)(4) (defining "unsolicited advertisement" **as** one "transmitted to any person without that person's prior express invitation **or** permission"). However, **as** the Commission has previously acknowledged, "the TCPA leaves the Commission without discretion to create exemptions from

or limit the effects of the prohibition.” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 F.C.C.R. 8752,8779 at ¶54 n.87 (1992). In other words, the word “implement” does not give the Commission authority to rewrite the facsimile advertisement prohibition at its pleasure, regardless of what Congress intended. “But the role of the agencies remains basically to execute legislative policy; they are no more authorized than are the courts to rewrite acts of Congress.” *Talley v. Mathews*, 550 F.2d 911,919 (4th Cir. 1977); *see also Chrysler Corporation v. Brown*, 441 U.S. 281,303 (1979) (“The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.” *Id.*)

The unauthorized rewriting of the pre-amendment TCPA is exactly what the Commission’s exemption represented. The pre-amendment TCPA drew a distinction between a “telephone solicitation” (*i.e.*, a “live” telemarketing call) and an “unsolicited advertisement” (*i.e.*, a facsimile advertisement). A “telephone solicitation” was defined as:

... the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person’s prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (§ 227(a)(3)).

An “unsolicited advertisement” was defined as:

... any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior

express invitation or permission, in writing or otherwise.

Id. (§ 227(a)(4)). The definition of “telephone solicitation” expressly provided for an “established business relationship” exemption to liability. However, the definition for “unsolicited advertisement” did not include such an exemption. The only exemption to liability for an “unsolicited advertisement” was “prior express invitation or permission.” *Id.*

The Commission was not authorized to create this exemption in the pre-amendment TCPA. Had Congress wanted such an exemption it would have said so in the definition of “unsolicited advertisement,” just as it did in the definition of “telephone solicitation.” Congress’ inclusion of the exemption in one definition but not in another should have been respected by the Commission. *See Rodriguez v. U.S.*, 480 U.S. 522, 525 (1987) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.”) (internal citations, quotations, and brackets omitted); *Russello v. U.S.*, 464 U.S. 16, 23 (1983) (“Had Congress intended to restrict §[(a)(1)] . . . it presumably would have done so expressly as it did in the immediately following subsection (a)(2). . . . The short answer is that Congress did not write the statute that way.”).

Congress’ intent that there should not be such an exemption was also clear from the fact that a prior version of the TCPA included the exemption, but Congress deleted it from the final version that was passed. *See* H.R. 1304, 102d Cong., 1st Sess. Sec. 3, Sec. 227(a)(4) (Nov. 18, 1991). The Commission was not free to simply “pencil back in” the exemption after Congress erased it because the Commission disagreed with the policy decision made by Congress, Congress writes the law, not the Commission. *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S.

186,200 (1974) (deletion of a provision from a prior version of statute “strongly militates against a judgment that Congress intended a result that it expressly decline[s] to enact.”); *Commonwealth of Pa., Dept. of Public Welfare v. U.S. Dept. of Health & Human Services*, 928 F.2d 1378, 1386 (3d Cir.1991) (“Because the Conference had before it the Senate’s suggestion for an exception due to ‘circumstances beyond control of the state’ and did not include it, but adopted instead a version closer to that offered by the House, we believe HHS may not reinsert the omitted language by regulation.”).

The Commission tacitly recognized the irrationality of the exemption when it rescinded it in 2003. However, under pressure from various telemarketing interest groups, the Commission made the rescission prospective only. Then the Commission repeatedly extended the effective date for the rescission, such that several years later the rescission still had yet to take effect. What the Commission fails to understand is that the exemption was void *ab initio* for lack of authority—the Commission could not perpetuate for any amount of time an exemption that was unlawful for the Commission to create in the first place.

The 2005 amendment to the TCPA to include the exemption highlights the absence of it in the prior version of the statute. There would have been no need for the amendment if the prior version of the TCPA included such an exemption (nor a need for it if the Commission’s exemption were valid). Congress’ creation of an exemption in 2005 did not validate the unauthorized action the Commission took in 1992 by creating an exemption on its own without Congressional authority.

V. Relief

Starkle **seeks** the review of the Order **of** the Chief of the Consumer and Governmental Affairs Bureau declining to commence a rulemaking proceeding to rescind the established business relationship exception for facsimile advertisements (**as** it existed from October 16, 1992 to July 9, 2005), which action was released publicly on March 15, 2007. Starkle believes the Commission should rescind the exemption or **otherwise** commence a rulemaking proceeding to rescind **the** rule.

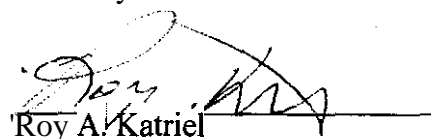
A copy **of** this application has been duly served on all parties to the above-captioned proceeding.

WHEREFORE, applicant respectfully requests that the Commission:

1. Grant this application to review the complained of action of the Chief **of** Consumer and Governmental Affairs Bureau;
2. Set this application for oral argument on the submission of briefs;
3. Grant applicant such other and further relief as is deemed just and proper.

Respectfully submitted this __13th__ day of April, **2007**.

Attorneys **for** Petitioner


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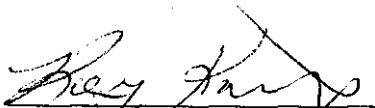
CERTIFICATE OF SERVICE

I, Roy Katriel, the attorney for petition in the above-captioned proceeding, hereby certify that I have served the foregoing document by filing the original and four true and exact copies thereof on the 13th day of April, **2007** to:

Marlene H. Dortch, Secretary, Federal Communications Commission
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There are no other parties to the proceedings.

Dated: April **13,2007**



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